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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 753

JOHN A. JOHNSON CONTRACTING CORPORATION
AND AMERICAN SURETY COMPANY OF NEW
YORK, *Petitioners,*

vs.

THE UNITED STATES OF AMERICA FOR THE USE AND
BENEFIT OF WORTHINGTON PUMP AND MACHINERY COR-
PORATION.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE THIRD CIRCUIT.

ANDREW B. CRUMMY,
Counsel for Respondent.

INDEX.

SUBJECT INDEX.

	Page
Respondent's statement of matters involved	1
Question presented	3
Argument	3
There is ample authority to support the Circuit Court of Appeals' Finding of Contractual Re- lationship between Petitioner and Respondent.	3
Conclusion	6

TABLE OF CASES CITED.

<i>Baltimore & Ohio Railroad Co. v. United States</i> , 261 U. S. 592	5
<i>Eliason v. Henshaw</i> , 4 Wheat. (U. S.) 225	5

STATUTE CITED.

Miller Act, 40 U. S. C. (1940 Ed.), Section 270a	1
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OTHER AUTHORITIES.

1 Williston on Contracts (Rev. Ed. 1936), Section 78A	4
1 Restatement, Contracts (1932), Section 63	4



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PORATION.

**RESPONDENT'S STATEMENT OF MATTERS
INVOLVED.**

Respondent brought this action under the Miller Act, 40 U. S. C. (1940 Ed.), Section 270a.

The War Department in 1940 sent out an informal invitation for bids, number 180, for certain equipment, including a feed water heater and a boiler feed pump, to be delivered to Fort Dix, New Jersey. Respondent, on December 27, 1940, submitted a bid for one feed water heater and one boiler feed pump. The War Department, on December 31, 1940, wrote, in response to Worthington, that its bid was accepted for one feed water heater and two boiler feed pumps. Respondent was authorized by the War Department to proceed with the manufacture of the equipment.

Respondent had to manufacture and deliver the equipment "on or before February 1, 1941" (Ex. P-3), (R. 60a).

Petitioner, John A. Johnson Contracting Corporation, hereinafter referred to as "petitioner", on January 9, 1941, entered into a contract with the United States to build a hospital at Fort Dix, New Jersey. The contract, among other things, provided that petitioner furnish the labor and material for a "Steam-heating distribution system for the sum of \$50,000" (R. 66a). This item included the equipment furnished by respondent. The contract provided, with respect to such item, as follows:

"The price quoted under Item I is subject to the condition that the Government shall make available to the contractor a source of supply from which the contractor can obtain the boilers, stokers and controls, feed water heater, brooching steel, boiler house stack, indirect fan and induced draft fan called for in the contract at a total of \$50,000" (R. 66a).

The war was on, time was of the essence. The War Department had, on December 31, 1940, authorized respondent "to proceed with the manufacture and shipment of this heater and boilers" (R. 60a). The War Department on December 31, 1940 (R. 60a), wrote respondent: "Confirming purchase order will be issued by the construction contractor, * * *".

Petitioner was the construction contractor. Petitioner, on January 21, 1941, sent a telegram to respondent confirming the order originally issued by Construction Quartermaster on December 31, 1940 (R. 70a). Respondent was in the process of finishing the manufacture of the equipment. Petitioner, on January 27, 1941 (R. 72a), by letter to respondent, confirmed its telegram of January 21, 1941 and the War Department order of December 31, 1940.

The equipment ordered by the War Department on December 31, 1940, which order was confirmed by telegram

and letter of petitioner, was manufactured and shipped within the time limited by the War Department order of December 31, 1940. The equipment was used in the erection and construction of the hospital at Fort Dix, New Jersey by the petitioner.

The United States District Court for the District of New Jersey found that there was a contractual relationship between petitioner and respondent. The Circuit Court of Appeals affirmed the findings of the District Court.

Question Presented.

Was there a contractual relationship between petitioner and respondent?

Brief in Opposition to Granting Writ of Certiorari.

Petitioner's Argument will be answered seriatim.

ARGUMENT.

Point I.

There is ample authority to support the Circuit Court of Appeals' finding of contractual relationship.

The Circuit Court of Appeals found that a contractual relationship was established between petitioner and respondent.

The petitioner makes much of an alleged order sent by Knecht on January 14, 1941 (R. 69a). If the petitioner really thought anything of the Knecht order, why did the petitioner on January 21, 1941 (R. 70a) send a telegram to respondent confirming the order of December 31, 1940? Why did petitioner on January 27, 1941 (R. 72a), write a letter to respondent confirming the telegram of the 21st and the order of the War Department dated December 31, 1940? In the letter of January 27, 1941, the petitioner,

among other things, wrote respondent: "*Forward shipping notices to J. A. J. Construction Company, Inc. and Harry Knecht Company, subcontractor on heating. Shipment at once.*"

If the respondent had a contract with Knecht why should the petitioner write such a letter? There was no contract between respondent and Knecht and petitioner knew it.

The Circuit Court was correct in its finding that there was a contractual relationship between petitioner and respondent.

Petitioner's offer was accepted by respondent's performance in furnishing the equipment.

Petitioner's letter of confirmation was sent January 27, 1941. No answer was sent petitioner by respondent, but on January 31, 1941, just four days later, the equipment was sent to Fort Dix, New Jersey and was subsequently used by petitioner in the erection and construction of the hospital.

Respondent replied with performance.

The Circuit Court wrote:

"Such a performance or tender of performance constitutes the completion of a contract."

and cites 1 Restatement, Contracts (1932), Section 63; 1 Williston on Contracts (Rev. Ed. 1936), Section 78A:

"The practical approach of the modern law has engrafted an important exception upon the fundamental rule that, since the offeror is master of his offer, its terms must be strictly complied with. This exception is that where the offer to a bilateral contract requests a promise of specified action, and the offeree instead of making the promise performs or tenders the very act, performance of which he was requested to promise, and does so within the time that would have been permitted for accepting by giving the promise, there is a valid acceptance. The doctrine is based upon the

practical view that actual performance is more valuable to the offeror than mere promise to perform. Scientifically, this is but an extension of the theory that a divergence in acceptance which does not qualify the offer in effect is immaterial. Since a promise followed, after the briefest imaginable interval, by tender or performance would be an acceptance in terms, it seems idle to insist on the promise as a requisite. * * *

1 Williston on Contracts 229-230.

* * * * *

"If an offer requests a promise from the offeree and the offeree without making the promise actually does or tenders what he was requested to promise to do, there is a contract, * * * provided such performance is completed or tendered within the time allowed for accepting by making a promise. A tender in such a case operates as a promise to render complete performance."

1 Restatement Contracts 69 Section 63.

Everything required of the respondent was done and there is no evidence to the contrary.

The cases of

Eliason v. Henshaw, 4 Wheat. (U. S.) 225,

and

Baltimore & Ohio Railroad Co. v. U. S., 261 U. S. 592, 597,

cited by petitioner on page 13 of its brief, have no application to the case sub judice. Not a single case cited by petitioner has any application to the matter in issue.

The petitioner in the Circuit Court argued that petitioner's contract with Knecht and Knecht's subsequent dealing with respondent effected a novation whereby Knecht was substituted for Johnson and that Knecht became the sole debtor of respondent. This contention failed.

The Circuit Court held, and rightly so, that performance is more valuable to the offeror than mere promise to per-

form. The petitioner argues about silence (petitioner's brief, page 15), but it got performance.

Point II—Petitioner's Brief.

Petitioner, in Point II of its brief, page 19, attempts to show that it was entitled to notice under the Miller Act. The respondent gave no notice. None was required because of the contractual relationship between petitioner and respondent.

Point III—Petitioner's Brief.

The Circuit Court found a contractual relationship between petitioner and respondent and there was nothing "strained and unprecedented" in the court's opinion.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ANDREW B. CRUMMY,
Counsel for Respondent.

